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Ethical Dilemmas Facing Today's Lawyer

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By Geoffrey C. Hazard Jr.

It is desirable that lawyers be trustworthy in dealing with opposing parties. It is impractical, however, to go very far in formulating rules that require such trustworthiness.

If a lawyer is trustworthy, then a statement he makes as a representation may be taken by an opposing party as a firm factual component of a transaction. This enables the opposing party to appreciate the situation and recognize what alternative resolutions are practicable. In the economist's view, the lawyer's voucher, if accepted as such, reduces transaction costs.

This economizing effect of trustworthiness can be seen in the opposing party's alternative means for verifying the factual components of a transaction: He can independently investigate the factual problem in question or employ someone else to do it. For example, if he wants to learn the testimony of a key adverse witness, he can take the word of the opposing lawyer or can take the witness' deposition.

Clearly, independent investigations will in many situations be preferred to reliance on the opposing lawyer.

Trustworthiness is especially useful for lawyers because of the kinds of transactions into which they are drawn and because of their peculiar access to the facts. Lawyers are drawn into situations that have a high element of uncertainty—contracts with serious risk of uncertainties in the future and disputes based on ambiguous evidence of what has occurred in the past.

Lawyers are in a unique position to make truthful recommendations and resolve uncertainties because they have peculiar access, arising from the lawyer-client relationship, to the facts that surround a given transaction. The question nevertheless remains whether the rules of professional conduct should *require* that this information be made fully available to opposing parties.

Regulation of trustworthiness

The present regulation of lawyer's trustworthiness is modest. The Code of Professional Responsibility, in DR 7-102(A)(5), provides that in "his representation of a client, a lawyer shall not . . . knowingly make a false statement of law or fact." It prohibits only misrepresentation and requires no affirmative disclosure. It is limited to statements of "fact" as distinguished from evidence, indications, or even probabilities of which the lawyer may be aware. DR 7-102(A)(3) provides that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal." This provision does not go far in the direction of a disclosure requirement. It simply incorporates by reference general requirements laid down by the law at large.

Lawyers will have to set their own standards, through voluntary conduct rather than by compulsion of law.

DR 7-102(B)(1) provides that "[a] lawyer who receives information clearly establishing that . . . his client has, in the course of the representation, perpetrated a fraud upon a person . . . shall promptly call upon his client to rectify the same, and if his client refuses . . . he shall reveal the fraud to the affected person . . . except when the information is protected as a privileged communication." In light of the exception in the last clause, it is ambiguous whether the provision can ever be operative. In any event, it only applies to fraud and even then only when the fraud is "clearly" established. Thus the disclosure required by DR 7-102(B)(1) is little more than that required for lawyers to escape complicity in their clients' fraud.

The net requirement of the Code of Professional Responsibility is therefore that lawyers avoid fraudulent representations. Such a precept falls far short of requiring trustworthiness.

Kutak Commission proposal

In 1980 the Kutak Commission proposed a more sweeping proposal. Its Discussion Draft of Jan. 30, 1980, proposed:

4.2 *Fairness to Other Participants*

(a) In conducting negotiations a lawyer shall be fair in dealing with other participants.

(b) A lawyer shall not make a knowing misrepresentation of fact or law, or fail to disclose a material fact known to the lawyer, even if adverse, when disclosure is:

(1) Required by law or the Rules of Professional Conduct; or

(2) Necessary to correct a manifest misapprehension of fact or law resulting from a previous mispresentation made by the lawyer or known by the lawyer to have been made by the client. . . .

The author is Nathan Baker Professor at Yale Law School, director of the American Law Institute, and former reporter of the American Bar Association Special Commission on Evaluation of Professional Standards (Kutak Commission). *This presentation adapts and updates the author's article in the December 1981 issue of the* South Carolina Law Review, *beginning at page 181.*

The idea underlying the proposal was that a lawyer, as the instrument of a transaction, should be the guardian of its integrity. The proposal did not hold lawyers strictly liable for the integrity of transactions or even burden them with a duty of reasonable care. Their only duty was to disclose facts of which an opposing party was obviously ignorant and which might affect the integrity of the transaction.

Strong objections were leveled at the proposal. The fundamental difficulty appears to stem from the lack of a firm professional consensus requiring the standard of openness that should govern lawyers' dealings with others. This lack of consensus indicates that lawyers, at least nationally, do not share a common conception of fairness in the process of negotiation.

This disagreement is not difficult to understand. The standards are necessarily derived from those of society as a whole, where subcultural variations are enormous. At one extreme lies the "rural God-fearing standard," so exacting that it often excludes even the use of lawyers. At the other extreme stands "New York hardball," now played in most larger cities using the wall-to-wall indenture for a playing surface. Between these extremes are regional and local standards and further variations that depend on the business involved, the identity of the participants, and other circumstances. Against this kaleidoscopic background, it is difficult to specify a single standard that governs the parties or a correlative standard for their legal representatives.

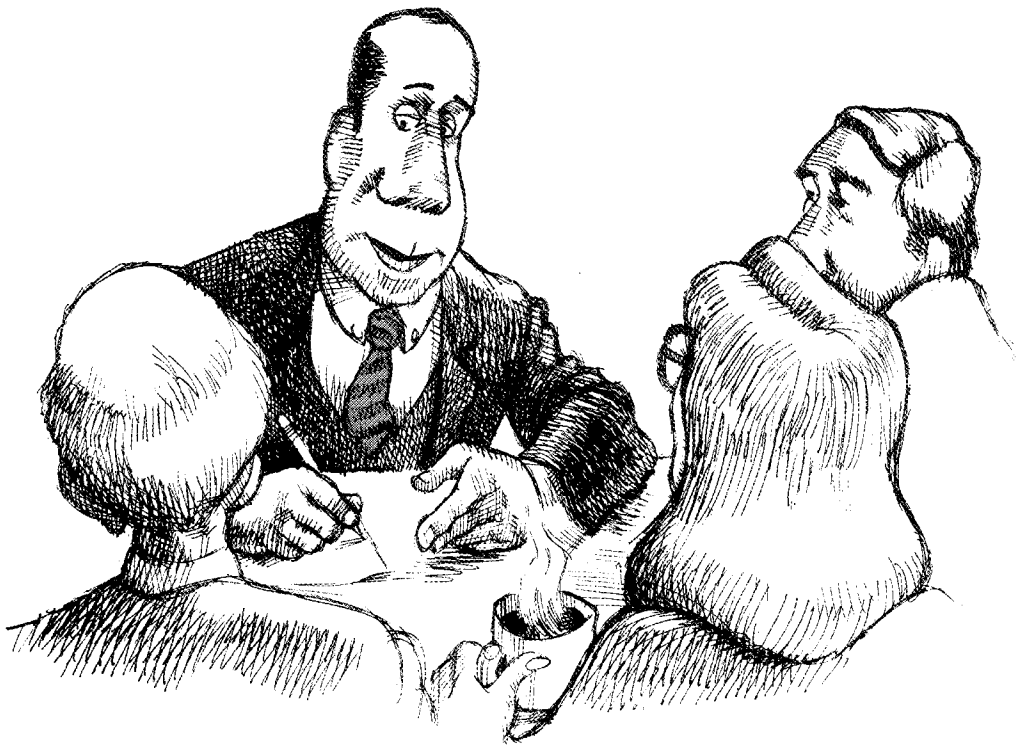
Levels of technique

Beyond this are factors in the legal profession itself. Lawyers differ widely in the technical sophistication they expect of themselves and of others with whom they deal. As a result, their expectations regarding their own or their opponents' knowledge in the context of a given transaction may vary widely. Among practitioners having a high level of technique, it is expected that a lawyer has carefully investigated and compiled relevant information, is familiar with recent developments in applicable law, recognizes all tax implications of a transaction, and anticipates secondary transactions likely to be involved. At another level of technique, lawyers may use a standard form for a transaction and then pray that things work out.

Where opposing lawyers are at the same level of technique, transactions proceed according to implicitly understood conventions that allay all but ordinary anxiety. Difficulties are greater where levels of technique vary. Lawyers accustomed to less sophisticated techniques are understandably fearful that they will be outmatched or even hoodwinked, with the possibility of loss of their clients and humiliation or even worse for themselves. *Continued on page 33*

Obligation to Opposing Parties

Lawyers, at least nationally, do not share a common perception of fairness in the process of negotiation.



Opposing parties

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Lawyers accustomed to more sophisticated techniques have a correlative but perhaps less apparent dilemma. First, signs of bumbling on the other side cannot necessarily be taken at face value; there is such a thing as country-slickering and it occurs even in the city. Moreover, sophisticated lawyers are at risk precisely because of their technical sophistication. High-level technicians recognize aspects of transactions that lawyers of lesser sophistication may overlook. But what are they to do with that knowledge? If it is withheld, the transaction becomes vulnerable to rescission because of the lawyer's nondisclosure. The lawyer's professional competence thus becomes a potential infirmity for the transaction. Conversely, if the lawyer must give the information to the opposing party, where does he or she stop, short of assuming responsibility for the interests of both parties?

In the ebb and flow of practice, lawyers adjust to these exigencies. The high-level technicians deal with each other with circumspection but confidence. Lawyers in other strata have their own conventions.

When levels are crossed, the less sophisticated lawyer must decide whether to trust the opponent or to associate someone else, research into the night, or perhaps even abort the transaction. The more sophisticated lawyer must decide whether to risk later recriminations about the transaction if the bargain is too hard, whether to make particular disclosures to protect the deal but at the risk of killing the deal, or whether to handle the transaction for both sides.

This range of possibilities is difficult to govern by regulation. A rule based on the premise that the legal profession is substantially homogeneous in technical sophistication would put the technically sophisticated lawyer in a hopeless dilemma when dealing with an unsophisticated opposing counsel.

On the other hand, it would be practically impossible to formulate a general rule that accounts for variations in technical sophistication. Consider the difficulties with the concept of specialization. Could we imagine rules of disclosure that were based on a distinction between Type A lawyers and Type B lawyers?

Model Rules provision

In light of these difficulties it is not surprising that the Kutak proposal was rejected in the adopted version of the Model Rules. As adopted, Rule 4.1 says.

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [governing confidentiality].

In effect, this is about the same as the Code of Professional Responsibility. It prohibits a lawyer from making fraudulent representations and from helping his or her client in doing so.

This is not a very exacting disciplinary standard. The result is that lawyers will have to set their own standards, through voluntary conduct rather than by compulsion of law.

At first blush the conclusion might be that there will be a "race to the bottom" in law practice: Lawyers simply will disclose only what the law of fraud requires.

This overlooks the strong incentives to fuller disclosure that were described at the outset of this article. These incentives operate for many lawyers in the absence of legal compulsion. Hence, many lawyers will want to be trustworthy in negotiation because being so will advance the interests of their clients. Other lawyers of course will want to be no more forthcoming than required by the law of fraud, because that will serve the interests of the clientele they expect to attract. There will be a kind of "trustworthiness market," where clients can seek out different kinds of candor, depending on what they have in mind.

That is undoubtedly the situation as it stands today. □

Bill Smith praised by former Md. bar prexy

The conclusion of the 7½ years of service of William J. Smith Jr. as executive director of the Maryland State Bar Association is the result of a very unusual combination of circumstances. (See "NABE chief will be exec without a bar," *Bar Leader*, Nov.-Dec. 1984, page 27.) I specifically do not comment upon such because it would not serve the Maryland bar or Bill Smith. Instead I take this opportunity to publicly note a few of my thoughts.

The last 10 years of my 33 years at the bar have found me intensely involved in the MSBA, and at present I am its immediate past president. I have observed Bill the lawyer, Bill the administrator, Bill the citizen and Bill the man.

During Bill's tenure our association grew from fewer than 7,000 members to 10,000, approximately 83 percent of the lawyers in our state. His excellent direction and support during this period were pivotal. Bar services grew at a substantially higher rate than membership, in large measure as a direct result of Bill's untiring efforts.

Bill has a "soft touch." While possessing great strengths and strong personality, he has advised and suggested rather than been pushy, demanding or interfering. He possesses a truly unique ability to communicate successfully with all segments and personalities of the bar, especially its leadership.

He is genuinely respected in his community, having been an activist, in the best sense of the term, for proper growth and development. His current presidency of the National Association of Bar Executives displays, most favorably, his talents and worth for all to see.

Whatever Bill decides to do now, I know he will do it well and with full dedication. He has my unqualified endorsement. I am proud to call him my fellow lawyer, and friend.

—Jeffrey B. Smith
Baltimore